86-580

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

Term,

LOUIS AND JACQUELINE H. TUCKER, h/w AND CHRISTINA TUCKER, by her parents and guardians LOUIS AND JACQUELINE H. TUCKER,

Petitioners

v.

WHITAKER TRAVEL, LTD., ATKINSON AND MULLIN TRAVEL, INC., R.M. TOURS a/k/a A RICHARD MOSS TOURS, LTD., HAPPY TRAILS STABLES AND COMMONWEALTH OF THE BAHAMAS AND THE MINISTRY OF TOURISM,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. What jurisdictional test did Congress intend courts to use when applying Clause One of Section 1605(a)(2) of the Foreign Sovereign Immunities Act?

2. Did Congress intend the "direct effect" phrase of Clause Three of Section 1605(a)(2) to deny the Foreign Sovereign Immunities Act claims of natural persons injured outside the United States?

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v.

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Third Circuit Court of Appeals denial of Plaintiffs' Petition for Rehearing is unpublished but is reproduced in Appendix A. The panel decision is also unpublished but is reproduced in Appendix B. The District Court's opinion is reported at 620 F. Supp. 578 and is reproduced in Appendix C.

JURISDICTIONAL STATEMENT

The order denying Plaintiffs' Petition for Rehearing was entered on July 11, 1986. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1603 provides in pertinent part:

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. §1605 provides in pertinent part:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

STATEMENT OF THE CASE

Federal jurisdiction in this matter was premised upon 28 U.S.C. §1330.

Plaintiffs Louis, Jacqueline and Christina Tucker brought this action against the Defendants Commonwealth of the Bahamas and the Ministry of Tourism for damages as a result of personal injuries which Jacqueline and Christina Tucker sustained in a horseback riding accident in the Bahamas on December 4, 1982.

Plaintiff Jacqueline Tucker and Christina Tucker, one of her six daughters, purchased an "Apple Tour" package trip to the Bahamas from Whitaker Travel Agency in Philadelphia during November, 1982. Both women had seen Bahamian vacation advertisements and were interested in going to the Commonwealth in order to participate in a variety of promoted activities that included horseback riding.

Whitaker Travel Agency presented Jacqueline and Christina Tucker with a Final Itinerary for their trip prior to the women's flight from Philadelphia to Nassau. This Itinerary advised the women that they would stay at the Ambassador Beach Hotel, which was one of the "three excellent Hotels" affiliated with Apple Tours.

Jacqueline and Christina Tucker flew from Philadelphia to Nassau on December 2, 1982 and went to the Ambassador Beach Hotel, which is owned by the Defendant Commonwealth of the Bahamas.

Apple Tours gathered the members of its tour in a room at the Ambassador and a woman who called herself "Ruth" told the tourists that she was their Apple Tour representative. Ruth wore an Apple Tour identification badge and she required each tourist to complete an Ambassador Beach Hotel registration card. Ruth then advised the assembled tourists to visit her at the Apple Tour courtesy desk in the Ambassador Beach Hotel Lobby should any of them need help.

On December 4, 1982, the Tuckers wished to go horseback riding so Ruth of Apple Tours sought and engaged Happy Trails Stables. Jacqueline Tucker paid two three dollar ($3.00) fees for

herself and Christina to Ruth. Ruth advised Jacqueline Tucker to pay fifteen dollars ($15.00) to the Happy Trails Stable. Happy Trails Stable's brochure was displayed throughout the Ambassador Beach Hotel at this time.

Happy Trails Stable's service van transported Jacqueline and Christina Tucker and two other young ladies to the riding stables in the early afternoon on December 4, 1982. All four stable guests advised the stable attendant that they were inexperienced riders and requested that the horses be walked.

Near the end of the ride the stable guide who had been leading the group fell off his horse. The guide's horse broke into a gallop and the other four horses began to gallop and threw each of their riders. All four women were injured and received medical treatment. One of the two young ladies later died of head injuries.

Jacqueline Tucker continues to suffer pain from her disabling injuries. Christina Tucker sustained severe head injuries which caused paralysis, permanent eyesight impairment, permanent impairment of speaking ability and permanent traumatical epilepsy.

Plaintiffs commenced two actions in the Philadelphia County Court of Common Pleas.

Defendants Commonwealth of the Bahamas and its Ministry of Tourism subsequently removed the Plaintiffs' complaints to the Eastern District of Pennsylvania.

On October 25, 1985, the District Court for the Eastern District of Pennsylvania denied Plaintiffs' Motion to Remand to the Philadelphia County Court and granted the Defendants' Motion to Dismiss. Both Defendants asserted foreign sovereign immunity under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1602 et seq. (Hereinafter, "FSIA").

Plaintiffs then appealed the District Court's Order of October 25, 1985 to the Third Circuit Court of Appeals.

On December 30, 1985 the Third Circuit consolidated the two actions.

A panel of the Third Circuit Court of Appeals affirmed the District Court's Order dismissing the complaint against the

present Defendants in a Memorandum Opinion filed on June 9, 1986.

Plaintiffs petitioned the Third Circuit for a Rehearing before the Third Circuit Court *en banc* but the Third Circuit denied the Petition on July 11, 1986.

REASONS FOR GRANTING PETITION

I. CONGRESS ENACTED THE FSIA IN ORDER TO RESTRICT SOVEREIGN IMMUNITY; THEREFORE, CLAUSE ONE OF SECTION 1605(a) (2) SHOULD BE APPLIED USING A "DOING BUSINESS" OR "SUBSTANTIAL CONTACT" JURISDICTIONAL TEST.

Congress enacted the Foreign Sovereign Immunities Act (hereinafter "FSIA") in 1976 so that citizens would have redress against foreign states in the United States courts. Since the advent of the United States, foreign states have used the concept of sovereign immunity as a shield against lawsuits in the United States.

When this Court was first presented with a sovereign immunity question in 1812, there were no statutory guideposts for Chief Justice John Marshall and his colleagues. Instead, the Supreme Court had to rely on general principles of national sovereignty.

In *The Schooner Exchange v. McFaddon*, 11 U.S (7 Cranch) 116 (1812), French sailors pirated a Baltimore merchant ship and armed the vessel on the high seas. Less than a year later, the French captain sailed the ship into port at Philadelphia. The original owners of the ship learned of its whereabouts and filed an attachment suit in federal district court.

Because the Madison administration was attempting to steer clear of the warring coalitions of both Great Britain and France at this time, the matter presented a difficult political and legal problem. After the district court dismissed the merchants' action on October 4, 1811, the circuit court reversed on October 28, 1811. The matter then came before the Supreme Court.

Attorney General Pinkney argued that the merchants' attempt at suing Napoleon's government should be decided by the executive branch rather then the judicial:

> When wrongs are inflicted by one nation upon another, in tempestuous times, they cannot be redressed by the judicial department . . . . . [t]he right to demand redress belongs to the executive department, which alone represents the sovereignty of the nation in its intercourse with other nations . . . the statutes of the U.S., are in hostility to the idea of jurisdiction." *The Schooner Exchange v. McFaddon, supra. p. 132-33.*

Chief Justice Marshall reviewed the evidence and relevant law and concluded that the court found it necessary to "rely much on general principles" because the Court was "exploring an unbeaten path" when considering whether an American citizen could sue a foreign state. *The Schooner Exchange v. McFaddon, supra.* p. 135. The Chief Justice decided that he had to rule in favor of sovereign immunity but he said that "the questions to which such wrongs give birth are rather questions of *policy* [emphasis added] than of law, that they are for diplomatic, rather than legal discussion, are of great weight and merit serious attention." *"The Schooner Exchange v. McFaddon, supra.* p. 146.

As this Court recently observed in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 76 L.Ed.2d, 81, 87 103 S.Ct. 1962 (1983), Chief Justice Marshall concluded in *Schooner Exchange* that the "United States had impliedly waived jurisdiction over certain activities of foreign sovereigns." The *Verlinden* opinion also stated that "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *supra.* p. 87.

The *Verlinden* opinion then said that the Supreme Court had followed Chief Justice Marshall's advice in *The Schooner*

Exchange over the years by consistently deferring "to the decisions of the political branches — in particular, those of the Executive Branch on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Verlinden B.V. v. Central Bank of Nigeria, supra*. p. 87.

Prior to 1952, the State Department would request immunity in suits filed against friendly foreign sovereigns such as the Plaintiffs' action. *Verlinden* 461 U.S. at 487. However, the "Tate letter" of that year announced that the United States had adopted the restrictive immunity doctrine of foreign sovereign immunity. *Verlinden* 461 U.S. at 488 Footnote 9.

Under this new doctrine, a foreign state could use the shield of sovereign immunity only for its public acts, not its private commercial ones. When parties sue the United States in foreign court the doctrine is applied in the same fashion, *1976 U.S. Code Congressional and Ad. News* p. 6605.

Because the doctrine of restrictive immunity was not enacted in a law, the Executive Branch had to assume the responsibility of deciding whether immunity would apply in a given action against a foreign state. As Congress analyzed in its commentary on the Foreign Sovereign Immunities Act, the State Department found itself in the "awkward position of a political institution trying to apply a legal standard to litigation already before the courts." *1976 U.S. Code Congressional and Ad. News* p. 6607. Additionally, the foreign state could decide to exert diplomatic pressure upon the Executive Branch in these situations and make it very difficult for the State Department to apply the Tate letter restrictive immunity criteria. *1976, U.S. Code Cong. and Ad. News*, p. 6607.

In order to remedy the problem of suits against foreign states in federal courts, Congress enacted the FSIA in 1976 following an executive branch recommendation. *1976 U.S. Code Cong. and Ad. News* p. 6604.

According to Congress, the FSIA would conform U.S. immunity practice to the method in other nations where the courts make all sovereign immunity decisions. *1976 U.S. Code Cong. and Ad. News* p. 6606. Congress said that the FSIA would: 1) codify the concept of restrictive immunity, 2) insure that the

restrictive immunity doctrine was applied in U.S. courts 3) provide a statutory procedure for suing a foreign state and thus obtain *in personam* jurisdiction and 4) provide remedies for the judgment creditor of a foreign state.

Despite these stated goals, the authors of the bill admitted that the FSIA would provide only very modest guidance to federal courts confronted with the immunity problem.[1]

The FSIA authors "decided to put faith in the U.S. courts"[2] although they were supposed to provide guidance to those courts.

When the FSIA became effective on January 9, 1977, claimants who wanted to sue a foreign state in federal court no longer had to wait upon the State Department to grant federal court jurisdiction by evaluating a foreign state's immunity. Instead, the claimants had to wait upon a federal district court's application of their factual situation to the language of the FSIA.

Section 1604 of the FSIA states that a "foreign state shall be immune" from federal court jurisdiction unless Sections 1605-1607 provide otherwise. 28 U.S.C.§1604. Because Section 1606 deals with the extent of liability and Section 1607 is concerned with counterclaims, a federal district court usually focuses its jurisdictional analysis on Section 1605. 28 U.S.C. §1605-07. Section 1605 (titled "General exceptions to the jurisdictional immunity of a foreign state") attempts to set guidelines for federal courts trying to decide if soverign immunity applies to a given factual situation.

Federal courts, which have attempted to apply the FSIA's Section 1605 to immunity suits such as the Plaintiffs' action, have found a statute which raises far more questions than answers. As Judge Kaufman of the Second Circuit analyzed, the FSIA purports to provide answers to the issues of sovereign immunity defense, subject matter jurisdiction and personal jurisdiction, yet the statute seems "to make the answer to . . . . . subject

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1. *Hearings on H.R. 11315 before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary 94th Cong., 2nd Sess. 53 (1976) ("1976 Hearings") (testimony of Monroe Leigh, Legal Adviser, Department of State).*

2. Hearings on H.R. 11315 *supra*.

matter jurisdiction, dispositive of all three." *Texas Trading and Milling Corp. v. Federal Republic of Nigeria* 647 F.2d 300, 306 (2nd Cir., 1981).

Congress stated that the foreign state must bear "the ultimate burden" of proving that its actions were public and not private in a federal immunity suit *(1976 U.S. Code Cong. and Ad. News* p. 6616) yet Congress also said that sovereign immunity would apply unless Sections 1605-1607 said otherwise in Section 1604.28 U.S.C. §1604.

Thus, Congress has told us that Plaintiffs such as the Tuckers must find an exception to sovereign immunity in Sections 1605-1607 even though Congress has placed the burden of proving immunity on a foreign state such as the Defendants. The District Court opinion in this case mirrored this contradiction by saying "a foreign state is immune . . . . unless one of several specified exceptions applies" and a footnote at the end of the sentence then said that the government defendants bore the burden of proving immunity. *Tucker v. Whitaker Travel* 620 F. Supp. 578, 583 footnote 4 (E.D. Pa., 1986).

Congress obviously assigned the burden of proving sovereign immunity to the foreign state because it intended to restrict a foreign state's immunity and thereby provide *"our citizens . . . . access to the courts* in order to resolve ordinary legal disputes." *1976 U.S. Code Cong. and Ad. News* p. 6605. This court quoted the above individual phrase in *Verlinden* 461 U.S. at 490, 76L.Ed.2d at 90 when evaluating the purpose of the FSIA.

Judge Tamm explained in *Transamerican Steamship Corporation v. Somali Democratic Republic*, 767 F.2d 998, 1002 (D.C. Cir., 1985), that "in accordance with the restrictive view of sovereign immunity reflected in the FSIA, the burden of proof in establishing the inapplicability of these exceptions is upon the party claiming immunity." When courts apply Section 1605 to a case such as Plaintiffs' action, they should remember the FSIA's codification of the doctrine of restrictive immunity which the State Department adopted in the Tate letter of 1952. As Judge Kaufman said in *Texas Trading* when he reviewed the history of the sovereign immunity doctrine:

> "Before the FSIA, plaintiffs enjoyed a broad right to bring suits against foreign states, subject only to State Department intervention and the presence of attachable assets. Congress in the FSIA certainly did not intend significantly to constrict jurisdiction; it intended to regularize it." *Texas Trading supra*. 647 F.2d at 313.

Section 1605(a)(2) applies to the present case because Plaintiffs' claims for injuries are based upon acts which are an integral part of the Defendant's regular course of commercial conduct ("commercial activities" under section 1603) both within and outside the United States. Section 1605(a)(2) says that:

> "(a) "a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case
>
> . . .
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

The House Report said that "Section 1605(a)(2) treats what is probably the most important instance in which foreign states are denied immunity, that in which the foreign state engages in a commercial activity." *1976 U.S. Code Cong. and Ad. News* p. 6617. Courts who consider the most important denial of immunity provision must look to Section 1603 for the definition of commercial activity. 28 U.S.C. §1603. This section defines both "commercial activity" and "commercial activity in the United States":

> "(d) A commercial activity means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct

> or particular transaction or act, rather than by reference to its purpose."
>
> (e) A "commercial activity carried on in the United States by a foreign state means commercial activity carried on by such state and having substantial contact with the United States."

Although Congress did not define the word "commercial", House Report 94-187 did say that "if an activity is customarily carried on for profit, its commercial nature could readily be assumed." *1976 U.S. Code Cong. and Ad. News* p. 6615. Furthermore, the House Report said that "a single contract, if of the same character as a contract which might be made by a private person, could constitute a "particular transaction or act" such as those contemplated by Section 1603. *1976, U.S. Code Cong. and Ad. News* p. 6615.

As Judge Kaufman said in *Texas Trading supra*. p. 308, phrases such as "regular course of [commercial] conduct" seem to authorize courts to cast the net wide and to identify a broad series of acts as the relevant set of activities." *Texas Trading and Milling Co. v. Federal Republic of Nigeria supra*. p. 308.

Allowing courts to identify a broad series of acts as being commercial accords with congressional intent regarding the Section 1603 definitions of commercial activity:

> "The courts would have a great deal of latitude in determining what is a commercial activity for purposes of this bill. It has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable." *1976 U.S. Code Cong. and Ad. News* p. 6615.

Congress clearly wanted to grant courts some flexibility in determining whether a foreign state's actions were commercial in order to give parties aggrieved by a foreign state recourse to the federal courts.

Because the Defendants Commonwealth of the Bahamas and Ministry of Tourism stipulated to the facts contained in Appendix D, there is absolutely no doubt that these Defendants are engaged in commercial activity which is also carried on in the United States. The Defendants state that they have encouraged

U.S. citizens to visit the Bahamas since at least 1980 by means of U.S. advertising outlets and communications facilities. Because the Defendants admit that 85% of their tourism business devolves from U.S. citizens, we know that the Defendants are engaged in a regular course of commercial conduct within and outside of the United States.

When one applies Section 1605 (a)(2) to the present case using the legislative purpose as a guide, the Plaintiffs appear to have an action which conforms to at least two of the Section 1605 (a)(2) clauses. Clause One applies because the Plaintiffs' action is based upon the Defendants' commercial activity (promotion of Bahamian tourism) carried on in the United States. Clause Three applies because the Plaintiffs' action is based upon the Defendants' acts of negligence in the Bahamas which were "in connection with" the Defendants' commercial activities elsewhere. The Defendants' acts in the Bahamas caused the Plaintiffs "direct effects" in the United States such as physical and emotional injury and financial loss.

The District Court declared that the Defendants were engaged in a Clause One "commercial activity" but the court cited Third Circuit opinions which held that Clause One of Section 1605(a)(2) "applies only if there is a nexus between the plaintiff's grievance and the sovereign's commercial activity in the United States." *Sugarman v. Aeromexico* 626 F.2d 270 (3rd Cir., 1980) *Velidor v. L/P/G. Benghazi,* F.2d (3rd Cir., 1981). The district court then stated that the relationship between the Plaintiffs' Bahamian tour injuries and the Defendants' commercial activities was "too attenuated" to satisfy Clause One's "based upon commercial activity" language. *Tucker supra* p. 585.

This District Court's action in summarily dismissing the Plaintiffs' Clause One claim simply does not accord with Congress' will because the Defendants never produced prima facie evidence of immunity. Instead, the Defendant *conceded* in a stipulation that it was engaged in a Section 1603 "commercial activity". (Appendix D)

Following the plaintiff's suit, Congress says that the Defendant must produce evidence in order to "establish that a for-

eign state or one of its . . . . instrumentalities is the defendant . . . . and that the plaintiff's claim relates to a public act" not within Sections 1605-1607. *U.S. Code Cong. and Ad. News*. p. 6616. Defendant should have produced "prima facie evidence" of "immunity" because "the ultimate burden of proving immunity would rest with the foreign state". *U.S. Code Cong. and Ad. News*, p. 6616.

Contrary to Congressional wishes, the district court did not require the Defendants to carry the immunity burden of proof following Plaintiffs' initial action. Because the Defendants stipulated to their own commercial activity, the Defendants could not have carried the immunity burden, anyway. (Appendix D)

Even though the District Court expressly said that Plaintiffs' claims "appear to be based upon defendants' commercial activities in the United States" and no evidence was offered to contradict Plaintiffs' claim, the District Court granted Defendants' motion to dismiss as to Clause One due to a "nexus test" which the Third Circuit has adopted. *Tucker supra*. 620 F. Supp. at 585.

The Third Circuit Court of Appeals affirmed the District Court's reading of the jurisdictional scope of Clause One and cited its decision in *Velidor v. L/P/G Benghazi*, 653 F.2d 812, (3rd Cir. 1981). (Appendix B-3).

Despite the Third Circuit's adoption of the "nexus" test as a jurisdictional barrier for Clause One of Section 1605(a)(2), the issue of the jurisdictional scope allowed by the phrase "based upon" in Clause One is certainly a question of federal law that this Court needs to settle.

The Circuit Courts have adopted conflicting tests for this issue and the Circuit Judges have also expressed their views as to what the purpose of the FSIA should be.

Judge Kaufman of the Second Circuit rejected a narrow interpretation of the "based upon" phrase for Clause One in *Gemini Shipping Inc. v. Foreign Trade Organization for Chemicals*

and Foodstuffs 647 F.2d 317, 319 (2nd Cir. 1981). After reviewing the legislative history of the FSIA, Judge Kaufman announced that the statute's authors intended "no such niggardly construction" of "based upon" because of the wide sweep which Congress intended for the phrase "commercial activity." Referring to Section 1603(e)'s definition of commercial activity in the U.S., Judge Kaufman noted that "commercial activity is carried on here if it has 'substantial contact with the United States.' " Judge Kaufman also said that: "the House Report states that the 'substantial contact' standard of §1603(e) can be satisfied by as little activity as receiv[ing] financing from a private or public lending institution located in the United States." *Texas Trading supra*. p. 319.

Judge Wilkey of the D.C. Circuit approved of Judge Kaufman's rejection of a narrow construction of Clause One's "based upon" in *Gilson v. Republic of Ireland*. 682 F.2d 1022, 1028 (D.C. Cir. 1982). Although Judge Wilkey found FSIA jurisdiction under Clause Two of 1605(a)(2) in his case, he noted that the "three clauses" of 1605(a)(2) "are intended to carve out a commercial act exception" to sovereign immunity. *Gilson v. Republic of Ireland supra*. p. 1028. Judge Wilkey's test for Section 1605's "based upon" standard would require the plaintiff to show either: (a) a direct causal connection between the foreign state's commercial activity in the U.S. and actions which caused the claim or (b) that the commercial activity is an element of the cause of action under whatever law governs the claim. *Gilson v. Republic of Ireland supra*. p. 1027 n. 22.

Judge Friendly also applied a Clause One "substantial contact" standard in *Ministry of Supply, Cairo v. Universe Tankships* 708 F.2d 80, 84 (2nd. Cir. 1983):

> When a foreign state has carried on a commercial activity within the United States, the first clause. . . . . withdraws immunity with respect to claims based not only on acts within the United States but also with respect to acts outside the United States if they comprise on integral part of the

> state's regular course of commercial conduct' . . . . "having *substantial contact* with the United States" [emphasis supplied.] 708 F.2d at 84.

Judge Friendly then quoted the FSIA House Report provision which stated that the "substantial contact" standard of Section 1603(E) can be met simply by receiving financing from a public or private lending institution in the U.S. *Ministry of Supply, Cairo v. Universe Tankships*, supra. p. 84.

Although Judge Duneway of the Ninth Circuit did not express a Clause One test in *Wolf v. Banco Nacional de Mexico* 739 F. 2d 1458, 1460 (9th Cir., 1984) he did find that a nationalized Mexican bank's issue of a certificate of deposit to a U.S. citizen "was clearly a commercial activity carried on in the United States" by Banamex. This factual finding would square with the House Report's comment on what is needed to meet the "substantial contact" standard of Section 1603(E).

The Fifth Circuit attempted to analyze most of the above tests while deciding *Vencedora Oceania Navigacion v. Compagnie Nation* 730 F.2d 195, 200 (5th Cir. 1984) and encountered difficulty simply in naming the tests. This court issued a *per curiam* Opinion which eventually adopted the Third Circuit's nexus test but the opinion showed interest in the "doing business" Clause One test that Judge Pierce proposed in *Rio Grande Transport Inc.* 516 F. Supp. 1155 (S.D.N.Y. 1981). After trying to decide whether Judge Friendly's opinion in *Ministry of Supply Cairo supra.* endorsed the "doing business" test for Clause One (see *Vencedora* 730 F.2d 195, 201 footnote 12), the Fifth Circuit *per curiam* opinion tenuously rested upon the House Report section which said that the FSIA "starts from a premise of immunity, and then creates exceptions to the general principle." *1976 U.S. Code Cong. and Ad. News* p. 6616.

The Fifth Circuit's Judge Higginbotham wrote a separate concurring and dissenting opinion in *Vencedora* that supported the doing business test for Clause One. Judge Higginbotham acknowledged the possibility of jurisdictional excesses that the "doing business" test presents, but he said that the remedy for these excesses was "adherence to Congress' mandate that the

business carried on in the U.S. be 'substantial' and use of the *forum non conveniens* doctrine". *Vencedora supra*. p. 205.

Judge Higginbotham found the *Vencedora* majority opinion to be the first to deny jurisdiction for lack of a nexus "where the defendant 'does business' in the United States and he termed the Third Circuit's rejection of a "doing business" test in *Velidor v. L/P/G Benghazi* 653 F.2d 812, 820 (3rd Cir. 1981) as "dicta" *Vencedora supra*. p. 206.

Zeroing in on the jurisdictional scope problem which confronts federal courts that interpret Clause One, Judge Higginbotham substituted the relevant sections of 1603(d) and (e) in Clause One and concluded that courts have been driven to substitutions for the words "based upon" because the entire Clause cannot be interpreted literally. Judge Higginbotham then began his discussion of the workability of a Clause One "doing business" standard by saying that the "language of section 1605(a)(2) . . . . provides a starting point for my interpretation but the primary congressional purpose of subjecting foreign governments acting commercially to jurisdiction like any other commercial entity ultimately serves as my compass." *Vencedora supra*. p. 205.

Because other plaintiffs will continue to file federal actions against foreign states which engage in a "regular course of commercial conduct" in the United States, this Court should delineate the proper jurisdictional scope of Clause One of 28 U.S.C. 1605(a)(2). Some federal courts have not looked to the FSIA's legislative history and noted the statute's purpose of subjecting foreign state's commercial entities to suit because they fear "affronts to foreign sovereigns hauled into our courts over disputes having nothing to do with the United States." *Vencedora, supra*. p. 210 (dissenting opinion). Other courts have acknowledged the legislative purpose and have attempted to clarify Clause One's jurisdictional scope by referring to Section 1603's provisions and applying due process jurisdictional limits such as "doing business" and "substantial contact."

Plaintiffs submit that their claims are based upon acts of the Defendants both within and outside the United States. Defendant's acts comprise an integral part of the Defendants'

regular course of commercial conduct (tourism) which has substantial contact with the United States as evidenced by the stipulation asserting that 85% of the Defendants' tourism business is attracted from the United States. Because the Defendants' "regular course of commercial conduct" has "substantial contact" with the United States and/or the Defendants do business in the United States, federal courts have subject matter jurisdiction over this suit under the FSIA. Because the Plaintiffs have properly served the Defendants under 28 U.S.C. §1608, federal courts also have personal jurisdiction over the defendants. Therefore, the Court should reverse the Orders of both the Third Circuit Court of Appeals and the District Court for the Eastern District of Pennsylvania and remand the present suit to the District Court for a complete litigation of the matters presented in Plaintiff's complaint.

II. CONGRESS' PURPOSE IN ENACTING THE FSIA WAS TO RESTRICT SOVEREIGN IMMUNITY SO NATURAL PERSONS WHO SUFFER INJURIES OUTSIDE THE U.S. SHOULD BE ALLOWED TO FILE ACTIONS UNDER CLAUSE THREE OF SECTION 1605(a)(2)

Plaintiffs Christina and Jacqueline Tucker both were injured in the Bahamas in connection with the Defendant's tourist activities both within and outside of the United States. Plaintiffs' Clause Three action is premised upon the Defendants' acts in the Bahamas which caused the injuries. Clause Three of Section 1605 (a)(2) requires that the acts "cause a direct effect in the United States."

Plaintiffs submit that the injuries which Christina and Jacqueline Tucker sustained in the Bahamas continued to cause a direct effect when the two women returned to the United States. Furthermore, the injuries caused a direct financial loss to the Plaintiffs due to large medical bills which the Tuckers incurred upon Christina and Jacqueline's return to the United States.

The District Court contradicted the parties' stipulations and the FSIA statutory purpose when it stated that Clause Three's requirements were "not satisfied" in the present case. *Tucker*

620 F. Supp. at 586. The Court said that the Defendants' acts which caused Christina and Jacqueline Tucker's injuries were not "connected to any commercial activities" which the Defendants carried on within or outside of the United States. *Tucker* 620 F. Supp. at 586.

Defendants stipulated that they encourage U.S. citizens to travel to the Bahamas in order to engage in activities such as horseback riding. (Appendix D) Defendants' commercial activities (encouragement of U.S. tourism) lured Christina and Jacqueline Tucker to the Bahamas; therefore, the Plaintiffs' claims for personal injuries are connected to the Defendants' tourist activities.

The District Court also said that the "pain and pecuniary loss" which the Plaintiffs suffered in the United States were "*indirect consequences*" (emphasis added) of the Bahamian horseback riding accident. *Tucker supra*. 620 F. Supp. at 586.

The Third Circuit said in its opinion that acts "causing injury to an American abroad" do not cause a "direct effect in the United States despite the fact that the injury continues to cause suffering." The Third Circuit cited its decision in *Sugarman v. Aeromexico* 626 F.2d 270 (3rd Cir., 1980) as authority for its holding. (Appendix B)

Sugarman was a U.S. citizen who purchased a roundtrip plane ticket from the New York area to Mexico. Sugarman flew aboard Mexico's national airline and he claimed injury and financial loss based upon a 15 hour delay which unexpectedly stranded him at the Acapulco airport. The Third Circuit held that Sugarman's claim had jurisdiction under Clause One but it did not explain *why* Clause Three did not apply. *Sugarman supra*. p. 270-273.

Other federal courts who have confronted the situation of Americans injured abroad suing under Clause Three have adopted a curious posture. Federal courts grant Clause Three access to corporations whose American finances have been harmed by Section 1605(a)(2) acts but the same courts have denied access to personal injury or death claimants such as the Plaintiffs. Judge Kaufman allowed a cement supplier to sue the Nigerian government for a contract breach overseas because the

supplier suffered a "direct" financial loss in the United States. *Texas Trading supra*. p. 312-313. He said that courts which construe the phrase "direct effects" should be "mindful more of Congress' concern with providing 'access to the courts' to those aggrieved by the commercial acts of a foreign sovereign." *Texas Trading supra*. p. 312.

Judge Kaufman briefly considered two personal injury/death cases involving Clause Three during his opinion in *Texas Trading*. In *Harris v. VAO Intourist, Moscow* 481 F. Supp. 1056 (E.D.N.Y. 1979) a man died in a fire inside a Soviet state-owned hotel. *Upton v. Empire of Iran* 459 F. Supp. 264 (D.D.C. 1978), *aff'd. mem.*, 607 F.2d 494 (D.C. Cir. 1979) involved a roof collapse upon American citizens waiting in the Tehran airport terminal. Judge Kaufman said that these Plaintiffs "undoubtedly suffered 'direct' effects" and then he said in a footnote that "since the injured parties there were natural persons, not corporations, it is easy to locate the 'effect' outside the United States." *Texas Trading supra*. p. 312, footnote 35.

In one sentence Judge Kaufman is pushing a corporation within the ambit of Section 1605(a)(2)'s Clause Three and then his footnote at the bottom of the page says that an overseas personal injury easily allows a court to deny the injured party Clause Three jurisdiction.

Judge Brieant noticed this unjust anomaly when he wrote an opinion about a U.S. citizen who was injured by the jet wash of a foreign state's commercial aircraft at the Kingston, Jamaica airport. *Close v. American Airines, Inc.* 587 F. Supp. 1062, 1065 (S.D.N.Y. 1984). After noting Judge Kaufman's footnote 35 in *Texas Trading supra*. p. 312 the court felt constrained to follow the Second Circuit precedent:

> That corporations injured in their American pocket books by commercial activities of state trading companies occurring outside the United States would enjoy greater access to the American courts than personal injury or death claimants similarly injured would seem on initial examination to present a somewhat anamalous statutory construction. Be that as it may, in light of Texas Trading, supra., this court

must follow *Harris* and *Upton*, without regard to its own view of what Congress intended." *Close supra*, 587 F. Supp. at 1065.

The Eleventh Circuit granted Clause Three injunctive relief to an American manufacturer which encountered financial problems due to the Iranian hostage crisis in *Harris Corporation v. National Iranian Radio and Television* 691 F.2d 1344 (11th Cir., 1982) but other Circuit Courts have not directed their sights on the Clause Three "direct effect" problem.

This Court needs to clarify the Clause Three/"direct effect" provision of Section 1605 (a)(2) because federal courts are completely denying federal court access to personal injury/death claimants who encounter misfortune outside the United States in connection with foreign commercial activities. If federal courts can find that a corporation suffering a financial loss is entitled to a Clause Three claim, then why can't federal courts grant Clause Three jurisdiction to the citizen who suffers physical, emotional *and* financial losses due to an injury abroad.

When the District Court denied Clause Three jurisdiction to the executor of Alan Harris' estate in *Harris v. VAO Intourist, Moscow supra*. 481 F. Supp. 1056, 1065, it justified its action by claiming that "Congress has given the courts little room to maneuver in a case such as the one now before us." Then the court used words very similar to those used by Chief Justice Marshall in *The Schooner Exchange v. McFaddon supra*.:

> "The sensitive and difficult problems presented by possible conflicts between private rights and international comity are, under our Constitution, pecuiliarly fitted for executive and legislative resolution. Responsibility for any change in the statutory balance lies with Congress, not the courts."

Unlike the *Schooner Exchange* situation, the *Harris* court *did* have some legislative guidance but it chose to ignore the FSIA statutory purpose and deny a death claimant Clause Three jurisdiction.

Because federal courts are supposed to treat the claims of natural persons in the same manner as they treat the claims of

corporations, this Court should clarify the "direct effect" phrase of Clause Three and affirm the FSIA purpose.

Congress hardly intended to deny federal court access to citizens injured overseas in connection with foreign state's commercial activities. The House Report on the F.S.I.A. said:

> "At the hearings on the bill it was pointed out that American citizens are increasingly coming into contact with foreign states and entities owned by foreign states. These interactions arise in a variety of circumstances, and they call into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes." *1976 U.S. Code Cong. and Ad. News* p. 6605.

The FSIA requires foreign states and their entities to carry the burden of proving the inapplicability of a Section 1605(a)(2) exception to a claimant's case. *Transamerican S.S. v. Somali Democratic Republic* 767 F.2d 998 (D.C. Cir. 1985). When have these foreign states and their commercial entities proven that the claimant did *not* suffer "direct effects" in the United States in the above cases? The answer seems to be that federal courts have seized upon the "direct effect" phrase as a convenient device with which they can limit Section 1605(a)(2) jurisdiction. These federal courts are acting contrary to the FSIA's purpose of affirming the concept of restrictive immunity for a foreign state's commercial acts. *1976 U.S. Code Cong. and Ad. News* p. 6605.

This Court should settle this limited interpretation of the scope of "direct effects" because it is an important question of federal law. In *Verlinden B.V. v. Central Bank of Nigeria* 461 U.S. at 489, 76 L.Ed. 2d at 89, 103 S.Ct. 1962, this Court said that a foreign corporation could sue a foreign government if the substantive requirements of the FSIA were met. Numerous American citizens who have been injured abroad have filed claims which meet the substantive requirements of the FSIA, yet courts have denied those plaintiffs access with their interpretation of "direct effects."

Plaintiffs in this case submit that if Clause One does not withdraw the Defendants' sovereign immunity defense, then

Clause Three applies and Plaintiffs' action satisfies the FSIA substantive requirement under the provision.

Defendants have the burden of proving that Clause Three does not apply to the Plaintiffs' action yet the Defendants have presented evidence which only tends to prove that FSIA jurisdiction applies. (see "Stipulations" in Appendix D which show existence of "commercial activity").

Plaintiffs have suffered "direct effects" which are as worthy of an FSIA claim for damages as the corporate monetary losses of those parties who have been allowed to maintain Clause Three claims. Federal courts have sought to restrict a class of potential plaintiffs and their action is contrary to this Court's opinion in *Verlinden* which said;

> Congress protected against this danger (of the courts becoming an international court of claims) not by restricting the class of potential plaintiffs, but rather by enacting substantive provisions requiring some form of *substantial contact* [emphasis added] with the United States". *Verlinden* 461 U.S. at 490, 76 L.Ed 2d at 90, 103 S.Ct. 1962.

Because the Defendants have not carried their burden of showing the inapplicability of Clause Three to Plaintiffs action, sovereign immunity is not available as a defense. The Defendants cannot deny the substantial contact which their commercial activities have had with the United States and they cannot show that the Plaintiffs did not suffer direct effects from the Defendants' acts in the Bahamas which were in connection with the Defendants' commercial activities.

Therefore, subject matter jurisdiction over the claim exists and because proper service was made upon the Defendants pursuant to 28 U.S.C. 1608, federal courts also have personal jurisdiction over the Defendants.

Plaintiffs respectfully request that this Court reverse the Third Circuit Court of Appeals on this matter and remand the case to the District Court of the Eastern District of Pennsylvania for a complete litigation of the issues presented.

CONCLUSION

For the reasons stated above, Plaintiffs Louis and Jacqueline Tucker respectfully request that the Petition for Writ of Certiorari hereby presented be granted.

Respectfully submitted

By:_____

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-1709/10

LOUIS and JACQUELINE H. TUCKER et al.

Appellants

v.

WHITAKER TRAVEL, LTD. et al.

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, *Circuit Judges*.

The petition for rehearing filed by Appellants, Louis and Jacqueline H. Tucker et al., in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

_____

Circuit Judge

Dated: July 11, 1986

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-1709/1710

LOUIS and JACQUELINE H. TUCKER
h/w and CHRISTINA TUCKER,
by her parents and guardians
LOUIS AND JACQUELINE H. TUCKER,

Appellants

v.

WHITAKER TRAVEL, LTD.
ATKINSON & MULLIN TRAVEL, INC.
R.M. TOURS a/k/a RICHARD MOSS TOURS, LTD.,
HAPPY TRAILS STABLES and
COMMONWEALTH OF THE BAHAMAS
MINISTRY OF TOURISM

On Appeal from United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Nos. 84-5123, 85-1685)

District Judge: Alfred L. Luongo

Submitted Under Third Circuit Rule 12(6)
June 5, 1986

Before: ALDISERT, *Chief Judge*,
GARTH, and SLOVITER, *Circuit Judges*

(Filed June 9, 1985)

MEMORANDUM OPINION

SLOVITER, *Circuit Judge*.

Plaintiffs Jacqueline Tucker, her husband Louis, and their daughter Christina appeal from the district court's order dismissing two complaints filed by them against the Commonwealth of the Bahamas and its Ministry of Tourism for injuries suffered by Jacqueline and Christina when they fell from their horses in the Bahamas and sustained injuries. According to the complaint, the mother and daughter arranged for a trip to the Bahamas through a private travel agency in response to an advertisement by a private touring company. While on their trip, the Tuckers contracted with a privately owned and operated stable for a horseback ride on the beach when the mishap occurred.

The complaints were originally filed in Pennsylvania state court and one named as defendants the Commonwealth of the Bahamas (Bahamas), the Ministry of Tourism (jointly referred to as "foreign state defendants"), the travel agent, the tour operator, and the stables, and sought damages for the injuries sustained as a result of the falls. The other contained essentially the same allegations but named only the Bahamas and the Ministry of Tourism as defendants. The complaints were removed to the district court by the foreign defendants. The foreign state defendants then filed a motion to dismiss the complaints against them on the ground of sovereign immunity, which the district court granted. The court remanded the remaining defendants to state court. *See Tucker v. Whitaker Travel, Ltd.*, 620 F. Supp. 578, 587 (E.D. Pa. 1985).

The Foreign Sovereign Immunity Act ("Act"), 28 U.S.C. §§1602 *et seq.*, provides immunity from suit in the United States for a foreign state and corporations owned by it unless the claim falls within one of the statutory exceptions. 28 U.S.C. § 1604.

There is no subject matter jurisdiction or personal jurisdiction over such a foreign state defendant unless, under the provision relevant here,

> the action is based upon a commercial activity carried on in the United States by the foreign state [clause 1]; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere [clause 2]; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States [clause 3].

28 U.S.C. § 1605(a)(2).

The district court concluded that the plaintiffs' claim was not "based upon" the foreign state defendants' commercial activity so as to come within clause 1 of section 1605(a)(2). The foreign state defendants concede that they engage in a commercial activity, i.e. the promotion of tourism, in the United States to come within clause 1. However, there must be a nexus between the plaintiffs' grievance and the soverign's commercial activity in the United States. *See Velidor v. L/P/G Benghazi*, 653 F.2d 812, 820 (3d Cir. 1981).

The Tuckers claim that their injuries were caused by the negligence of certain employees of a privately owned and operated stable located in the Bahamas. We agree with the district court that the relationship between this claim and the foreign state defendants' advertisements in the United States is too attenuated to satisfy the requirements that the claim be "based upon" the foreign state defendants' commercial activity in the United States. [1]

Patently, the allegations of the complaints do not satisfy the requirement of clause 2 that the action be based upon "an act performed in the United States." Plaintiffs argue, however, that they satisfy clause 3, under which a foreign state loses its immunity, and thereby becomes subject to jurisdiction of courts of

1. The district court held that to the extent that the Tuckers' alternate theories of recovery against the governmental defendants — negligent misrepresentation, breach of warranty, and duty to warn — could be viewed as "based on" the defendants' commercial activities in the United States, the facts alleged failed to state a claim upon which relief could be granted. We affirm this holding.

the United States, if an act outside the United States in connection with a foreign state's commercial activity elsewhere causes a direct effect in the United States. The Tuckers argue that their injuries in connection with the foreign state defendants' commercial activity caused a direct effect in the United States. We have previously held, however, that causing injury to an American citizen abroad does not cause a direct effect in the United States despite the fact that the injury continues to cause suffering. *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 272 (3d Cir. 1980).

In addition, as we concluded above, the acts upon which the Tuckers base their claims are in no way connected to the foreign state defendants' commercial activity. Finally, we are unpersuaded by plaintiffs' contentions that regulation of tourism and/or the alleged failure to regulate horseback riding, provide adequate police or investigative reports, or take action against the other parties sued in this action are commercial activities. As the district court concluded, these are "peculiarly governmental" activities. *See* 620 F. Supp. at 584.

Since none of the exceptions in §1605(a)(2) applies to the foreign state defendants' commercial activity, they retain their immunity from judicial action. Therefore, the district court did not err in holding that it had no personal or subject matter jurisdiction over the foreign state defendants.

We will affirm the district court's order dismissing the complaint against the foreign state defendants.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LOUIS and JACQUELINE H. TUCKER h/w and CHRISTINA TUCKER, by her parents and guardians LOUIS and JACQUELINE TUCKER	:	CIVIL ACTION NO. 84-5123
v.	:	
WHITAKER TRAVEL, LTD. ATKINSON & MULLIN TRAVEL, INC. R. M. TOURS a/k/a RICHARD MOSS TOURS, LTD. HAPPY TRAILS STABLES COMMONWEALTH OF THE BAHAMAS MINISTRY OF TOURISM	:	
LOUIS and JACQUELINE TUCKER h/w and CHRISTINA TUCKER, by her parents and guardians LOUIS and JACQUELINE TUCKER	:	CIVIL ACTION NO. 85-1685
v.	:	
THE COMMONWEALTH OF THE BAHAMAS and MINISTRY OF TOURISM	:	

OPINION

Luongo, Ch.J. OCTOBER 25, 1985

Plaintiffs brought these related actions to recover for personal injuries which Jacqueline and Christina Tucker sustained while horseback riding in the Bahamas. Defendants are the Commonwealth of the Bahamas (the Bahamas), the Ministry of

Tourism, several travel agencies and Happy Trails Stables. The complaints were filed in the Court of Common Pleas of Philadelphia County and were removed to this court by the Bahamas and the Ministry of Tourism (foreign government defendants, hereinafter government defendants). Plaintiffs have moved to remand Civil Action No. 84-5123 to state court or, in the alternative, to sever and remand the claims against all but the government defendants. The government defendants have moved to dismiss both cases for insufficient service of process, lack of personal and subject matter jurisdiction, and failure to state a cause of action. I will consider the motions filed in these two cases together. For the reasons set forth below, I will deny plaintiffs' motion to remand No. 84-5123 to state court and will grant the government defendants' motions to dismiss on the ground of foreign sovereign immunity. Because dismissal of the government defendants removes the basis for federal jurisdiction, the remaining defendants will be remanded to state court. Plaintiffs' motion to sever and remand the claims against these defendants will therefore be dismissed as moot.

I. Plaintiffs' Motion to Remand

Plaintiffs assert as the first ground for their motion to remand that under the Foreign Sovereign Immunities Act (FSIA) the state courts may hear actions against a foreign government. *See* 28 U.S.C. §§1602, 1605. A companion case is currently pending in the Philadelphia Court of Common Pleas. The Hotel Corporation of the Bahamas, a named defendant in that case, did not act to remove the case to federal court. Plaintiffs argue that the Hotel Corporation is an agent of the Bahamas and that its failure to remove constitutes a waiver binding upon the government defendants in this case. Plaintiffs argue further that remand would permit their cases to be tried together, thus ensuring uniformity of result and efficient use of judicial resources, and, finally, that remand is required because the government defendants did not obtain the consent of all defendants to the removal petition.

The government defendants argue that as "foreign states" under the FSIA they have an absolute right of removal, that they do not need the consent of co-defendants, and that they cannot be deprived of this right on grounds of judicial efficiency. The government defendants deny that the Hotel Corporation's failure to remove a case in which they were not parties bars them from removing these cases.

The Bahamas and the Ministry of Tourism are "foreign states" under 28 U.S.C. §1603.[1] Thus, they have the right under 28 U.S.C. §1441(d)[2] to remove these actions to federal court. I agree with defendants' contention that co-defendants need not join in the removal petition. The Court of Appeals for the Fifth Circuit has noted that "§1441(d) by its terms requires no defendant other than the 'foreign state' to assent to or join the removal petition." *Arrango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1375 (5th Cir. 1980). The legislative history of the FSIA establishes that the consent of co-defendants is not necessary: "[n]ew subsection (d) of section 1441 permits the removal of any such action at the discretion of the foreign state, even if there are

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1. Title 28 U.S.C. §1603 provides, in pertinent part:

For purposes of this chapter—

(a) A "foreign state," except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

Plaintiffs do not dispute that the government defendants satisfy the requirements of this section.

2. Title 28 U.S.C. §1441(d) provides, in pertinent part: "Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending."

multiple defendants and some of these defendants desire not to remove the action or are citizens of the State in which the action has been brought." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 32, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6631. *See also* 1A J. Moore, *Moore's Federal Practice* ¶0.168[3.-2-2] at 559 (2d ed. 1985).

In addition, when a "foreign state" defendant removes under §1441(d), "the entire action against all defendants accompanies it to federal court." *Arango*, 621 F.2d at 1375. *See also Mori v. Port Authority*, 100 F.R.D. 810, 812 (S.D.N.Y. 1984); 1A *Moore's Federal Practice* ¶0.163-1 at 369. These cases were therefore properly removed to federal court on the petition of the government defendants.

I also reject plaintiffs' contention that the government defendants waived their right to remove these actions. Plaintiffs have cited, and my research has disclosed, no authority for the proposition that a defendant's failure to remove an action is binding upon different defendants in a different, though related, action.[3] The cases upon which plaintiffs rely are inapposite.

The defendant in *Laughlin v. Dow Chemical Co.*, 563 F. Supp. 271 (S.D.Tex. 1983), an American subsidiary of a French-nationalized corporation, had no independent right of removal. The court held that the parent corporation's removal of a related

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3. Under limited circumstances, a defendant's failure to remove may become binding on other defendants. Courts have construed §1441 to require that a removal petition be filed within thirty days after the first defendant is served. If additional defendants are named after the thirty-day period expires, they have no right to remove. *See, e.g., Schmidt v. National Organization for Women*, 562 F. Supp. 210, 212 (N.D.Fla. 1983); *Balestrieri v. Bell Asbestos Mines, Ltd.*, 544 F. Supp. 528, 529-30 (E.D.Pa. 1981); *Fugard v. Thierry*, 265 F. Supp. 743, 745-57 (N.D.Ill. 1967). The rationale for this rule is that the first defendant, having failed timely to remove, cannot join in the removal petition. "Since all defendants must join in a petition for removal, when the initial defendant waived her right to remove the other defendants fell subject to the same disability." *Id.* at 745. *See also* 1A *Moore's Federal Practice* ¶0.168 [3.-5-5] at 586-87. If, as in the present cases, the consent of all defendants is not needed there is no reason to apply this rule. *Id.* at 587 n.10. The considerations underlying the rule are also not implicated when different defendants in a separate, though related, action seek to remove.

but separate action did not confer the right to remove upon its subsidiary. *Id.* at 272-73. The holding in *Laughlin* has no relevance to the instant cases, in which the government defendants are "foreign states" with an independent right to remove under §1441(d).

Plaintiffs also cite *Blue Ox Corp. v. Murphy Oil Corp.*, 524 F. Supp. 1019 (D.Mont. 1981), in which the court held that a defendant's failure to remove a lawsuit constituted a waiver of his right to remove a later suit based on the same occurrence. The court reasoned that the two complaints "name[d] the same parties and allege[d] the same wrong." *Id.* at 1020. The state action had been pending for ten years, and the court was reluctant "[t]o allow the defendant to 'test the water' in state court and now come before this court with essentially the same action." *Id.* at 1022.

These concerns are not implicated here, where the defendants seeking to remove the second action were not parties to the first. The Hotel Corporation's failure to remove a separate action should not bar defendants in these actions from exercising their right of removal. The Hotel Corporation asserted in the state court action that it is a corporate entity established by the Bahamian legislature, entitled to invoke the defense of sovereign immunity. This is not inconsistent with the government defendants' allegation that the Hotel Corporation remains an entity distinct from the Bahamian government and other agencies such as the Ministry of Tourism. The Supreme Court has held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 626-27 (1983). Plaintiffs have set forth no grounds upon which I can conclude that the Hotel Corporation's separate status should be disregarded.

Finally, considerations of judicial efficiency do not provide a basis for remanding this case to state court. The right granted to foreign states by §1441(d) is a significant one. According to the

House Judiciary Committee, "[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts." H.R. Rep. No. 1487 at 32, 1976 U.S. Code Cong. & Ad. News at 6631. The government defendants have exercised their right to remove, and I cannot deprive them of a federal forum simply because remand to state court may promote judicial efficiency. *See, e.g., Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) (district court may not remand a case properly removed and within its jurisdiction for discretionary reasons not authorized by 28 U.S.C. §1447(c)). Plaintiffs' motion to remand No. 84-5123 to state court will be denied.

II. Defendants' Motions to Dismiss

The government defendants have moved to dismiss on two grounds. They claim first that service of process was insufficient under the FSIA, and second that they are entitled to sovereign immunity and this court therefore lacks personal and subject matter jurisdiction. Because I conclude that the complaints against the government defendants must be dismissed on the basis of their sovereign immunity, I need not, and do not, decide whether the government defendants were properly served.

Under the FSIA, a foreign state is immune from the jurisdiction of federal and state courts unless one of several specified exceptions applies.[4] 28 U.S.C. §1604. Section 1605 (a) (2) creates exceptions for actions

> based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial

4. The government defendants bear the burden of establishing that they are entitled to immunity. *See* H.R. Rep. No. 1487 at 17, 1976 U.S. Code Cong. & Ad. News at 6616.

activity of the foreign state elsewhere and that act causes a direct effect in the United States.

The "commercial exception" of §1605 (a)(2) applies if: (1) plaintiffs' suit is "based upon a commercial activity" conducted by the foreign state; and (2) this commercial activity has a sufficient connection with the United States. *See, e.g., Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1107 (5th Cir. 1985); *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (3d Cir. 1980).[5]

Plaintiffs make essentially two claims. First, they contend that the government "has preempted and regulates the entire field of tourism" Complaint at ¶82. Under this theory, plaintiffs seek to hold the government defendants liable for failure to regulate horseback riding, failure to supervise or take action against the parties allegedly responsible for plaintiffs' accident.

The government defendants contend they are entitled to immunity for such acts. I agree. Plaintiffs challenge the Bahamian government's decisions whether and how to regulate an industry, police the activities of its citizens, and investigate or assist in the investigation of accidents within its borders. Such decisions are peculiarly governmental and may not be subjected to scrutiny in the United States courts. *See generally International Association of Machinists v. OPEC*, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); H.R. Rep. No. 1487 at 14, 1976 U.S. Code Cong. & Ad. News at 6613 (foreign states are immune for acts which are "sovereign or governmental in nature").

The second claim is based upon the government defendants' advertising and promotion of tourism. The parties have stipulated that defendants engage in extensive advertising to promote tourism and sports activities in the Bahamas.

Advertising and promotion of an industry are activities in which a private party could engage and which are "customarily

5. Plaintiff's memorandum also discusses §1605(a)(5), which provides an exception for actions "in which money damages are sought against a foreign state for personal injury or death . . . occurring in the United States and caused by the tortious act or omission of that foreign state. . . ." Because plaintiffs' injuries did not occur in the United States, this exception is inapplicable.

carried on for profit." H.R. Rep. No. 1487 at 16, 1976 U.S. Code Cong. & Ad. News at 6615. They are thus commercial activities within the meaning of §1605(a)(2). *Id. See also Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d 1458 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 784 (1985) (where plaintiff, a United States resident, purchased certificates of deposit as a result of defendant's advertising in the United States, the sale of CDs to plaintiff was a commercial activity carried on in the United States).

Defendants do not deny that they are engaged in commercial activities. Rather, they claim immunity on the ground that plaintiffs' cause of action is *not sufficiently connected* to their advertising activities to fall within the commercial exception. Section 1605(a)(2) sets forth the connections on which jurisdiction can be premised.

The first clause of §1605(a)(2) permits an action "based upon a commercial activity carried on in the United States." Plaintiffs contend their claims are based upon defendants' advertising activities in the United States. They have submitted a number of brochures and promotional materials published by the government defendants. Several brochures specifically mention horseback riding. One states: "What could be more refreshing than riding a grand horse through the tropical setting of miles of beachfront?" Others list the Happy Trails Stables and contain pictures of people riding horses. According to plaintiffs, defendants "lured" them to the Bahamas through misleading advertisements, Complaint at ¶¶87, 88, and misrepresented horseback riding as a " 'relaxing,' rather than harm-inducing activity." Memorandum of Law accompanying Plaintiffs' Response to the Defendants' Motion to Dismiss at 15, No. 85-1685.

According to the Third Circuit Court of Appeals, the first clause of §1605(a)(2) applies only if there is a nexus between the plaintiff's grievance and the sovereign's commercial activity in the United States. *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (3d Cir. 1980). *See also Velidor v. L/P/G Benghazi*, 653 F.2d 812, 820 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982). Plaintiff in *Sugarman* sued Aeromexico, the national airline of Mexico for injuries caused by a flight delay at the Acapulco airport.

Aeromexico was a carrier of passengers between Mexico and the United States and conducted substantial airline operations in the United States. Plaintiff purchased Aeromexico tickets in New Jersey. The court found a sufficient relationship between plaintiff's injury and Aeromexico's commercial activities in the United States to permit the lawsuit. *Id.* at 272-73.

The nexus between the instant plaintiffs' personal injury claims and the government defendants' commercial activities falls far short of that in *Sugarman*. In *Sugarman*, the foreign state defendant's commercial activity was the conducting of airline operations in the United States. Plaintiff was injured because he was on one of defendant's Mexico-United States flights. The injury thus arose directly from defendant's performance of a commercial activity. *See id.*; *Ohntrup v. Firearms Center Inc.*, 516 F. Supp. 1281 (E.D.Pa. 1981) (permitting an action for injuries caused in the United States by firearm which "foreign state" defendant exported to the United States), *aff'd mem.*, 760 F.2d 259 (3d Cir. 1985).

In this case, defendants' commercial activities consist of advertising to promote tourism and sports activities, including horseback riding, in the Bahamas. Plaintiffs claim their injuries occurred because of the negligence of the Happy Trails Stables and its employees. The relationship between plaintiffs' injuries in the Bahamas and defendants' advertisements is simply *too attenuated* to satisfy the requirement that plaintiffs' claims be "based upon" commercial activity in the United States. *See Tigchon v. Island of Jamaica*, 591 F. Supp. 765, 767-68 (W.D.Mich. 1984); *Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056, 1061 (E.D.N.Y. 1979); *Tucker v. Whitaker Travel, Ltd.*, Nos. 977, 1055, 1056, 1109, 1792 Philadelphia 1984, slip op. at 5-7 (Pa. Super. Ct. Oct. 18, 1985). *See also Dorrian v. Canadian Pacific Hotels, Ltd.*, No. 80-1740 (E.D.Pa. Dec. 2, 1980).

Plaintiffs also, however, advance negligent misrepresentation and breach of warranty theories. They claim the government defendants' advertisements were misleading and induced them

to visit the Bahamas and to go horseback riding.[6]

These claims do appear to be "based upon" defendants' commercial activities in the United States. Plaintiffs' complaint, however, fails to state a cause of action for negligent misrepresentation or breach of warranty. I cannot accept plaintiffs' contention that an advertisement describing horseback riding as "refreshing" negligently misrepresents the activity as safe. Defendants' advertisements are not "representations" concerning the activity of horseback riding. Rather, they contain statements of opinion and description, which cannot be the basis for a claim of misrepresentation. *See, e.g.*, 4A *Personal Injury: Actions-Defenses-Damages* §105[3][b][i] at Fraud-112, 116 (L. Frumer ed. 1982) ("broad and general commendatory or extravagant statements . . . or puffing . . . have generally been held to be too vague to be taken as anything other than reflections of the opinion of the speaker.").

Moreover, plaintiffs have alleged nothing from which I can conclude that defendants had a duty to warn them of hazards associated with horseback riding. Plaintiffs have not claimed that defendants owned or controlled the Happy Trails Stables. *See Lavine v. General Mills*, 519 F. Supp. 332, 335 (N.D.Ga. 1981). *See also Morena v. South Hills Health System*, 501 Pa. 634, 642, 462 A.2d 680, 684 (1983) ("Duty, in any given situation, is predicated on the relationship existing between the parties at the relevant time"); *English v. Lehigh County Authority*, 286 Pa. Super. Ct. 312, 336-38, 428 A.2d 1343, 1356-57 (1981).

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6. Although these are state law claims, the parties have not discussed the issue of what law should apply. Plaintiffs apparently assume that the case is governed by general principles of United States law, as found in various cases and in provisions of the Restatements. The parties have not argued that Bahamian law applies, nor have they submitted information about the requirements of Bahamian law. I will therefore apply the law of Pennsylvania to these claims. *See* Fed.R.Civ.P. 44.1 ("A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice."); 42 Pa. C.S.A. §5327(a); Restatement (Second) of Conflict of Laws §136, comment h, at 378-79 (1971). *See also Cavic v. Grand Bahama Development Co.*, 701 F.2d 879, 882 (11th Cir. 1983); *Montgomery Ward & Co. v. Pacific Indemnity Co.*, 557 F.2d 51, 58 n.11 (3d Cir. 1977).

Defendants' brochures do not purport to include safety information about the Happy Trails Stables or the activity of horseback riding. The listing of the stables and the brief, general descriptions of the activity found in those brochures do not give rise to a duty to warn. *See id.* at 337-38, 428 A.2d at 1357.

Plaintiffs' breach of warranty theory falls on similar grounds. The statements in defendants' advertisements cannot reasonably be interpreted to warrant plaintiffs' safety if they were to go horseback riding in the Bahamas. *See* 4A *Personal Injury* §105(3)(b)(i) at Fraud-114. In *Lavine v. General Mills*, 519 F. Supp. 332 (N.D. Ga. 1981), the court held that a travel agency was not liable for breach of warranty when the plaintiff was injured on a tour arranged by the agency. The court reasoned: "Even if it were made, a general promise that the trip would be 'safe and reliable' does not constitute a guarantee that no harm would befall plaintiff." *Id.* at 336. Certainly a description of horseback riding as "refreshing" does not constitute a warranty that it is safe.

I conclude that plaintiffs' claims, to the extent that they are based on defendants' commercial activities, do not state a cause of action. Clause one of §1605(a)(2) thus provides no basis for abrogation of defendants' sovereign immunity.

The second clause of §1605(a)(2) is also inapplicable. Plaintiffs base their claims upon acts performed in the Bahamas and commercial activities performed in the United States, not upon acts "performed in the United States in connection with a commercial activity of the foreign state elsewhere."

The third clause permits an action based upon "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." §1605(a)(2). The requirements of this clause are not satisfied in the instant case. The acts upon which plaintiffs base their personal injury claims are not, in my view, connected to any commercial activities which the government defendants carried on either in the United States or elsewhere. Moreover, those acts did not cause a "direct effect" in the United States.

The direct effects of the various defendants' tortious conduct are plaintiffs' injuries, which occurred outside the United States. Whatever pain and pecuniary loss plaintiffs suffer in the United States are indirect consequences of the accident in the Bahamas. As Judge Hannum held in *Dorrian v. Canadian Pacific Hotels, Ltd.*, No. 80-1740, slip op. at 9 (E.D. Pa. Dec. 2, 1980), "causing injury to an American citizen abroad does not cause a direct effect in the United States despite the fact that the injury which was suffered abroad continues to cause suffering and economic loss to plaintiff in the United States." *See also, e.g., Australian Government Aircraft Factories v. Lynne*, 743 F.2d 672, 674-75 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 1189 (1985); *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 272 (3d Cir. 1980); *Close v. American Airlines, Inc.*, 587 F. Supp. 1062, 1064 (S.D.N.Y. 1984); *Tucker*, Nos. 977, 1055, 1056, 1109, 1792 Philadelphia 1984, slip op. at 8-9. Since plaintiffs' injuries do not constitute a direct effect in the United States, clause three of §1605(a)(2) is inapplicable.

Under the FSIA, federal district courts have personal and subject matter jurisdiction only if the foreign state defendants are not entitled to immunity. 28 U.S.C. §1330(a)&(b); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 485 n.5 (1983). None of the exceptions to sovereign immunity set forth in the FSIA apply in these cases. The government defendants are therefore immune and I lack personal and subject matter jurisdiction. The government defendants' motions to dismiss will be granted.

Dismissal of the foreign government defendants eliminates the source of federal removal jurisdiction in these cases. I will therefore exercise my discretion to remand the remaining defendants to state court. *See, e.g., United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1377 n.6 (5th Cir. 1980); *Hinkle's Jeep Sales v. Villa Enterprises*, 90 F.R.D. 49, 52 (S.D. Fla. 1981).

Ch. J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LOUIS and JACQUELINE H. TUCKER h/w and CHRISTINA TUCKER, by her parents and guardians LOUIS and JACQUELINE TUCKER	:	CIVIL ACTION NO. 84-5123
v.	:	
WHITAKER TRAVEL, LTD. ATKINSON & MULLIN TRAVEL, INC. R. M. TOURS a/k/a RICHARD MOSS TOURS, LTD. HAPPY TRAILS STABLES COMMONWEALTH OF THE BAHAMAS MINISTRY OF TOURISM	:	

LOUIS and JACQUELINE TUCKER h/w and CHRISTINA TUCKER, by her parents and guardians LOUIS and JACQUELINE TUCKER	:	CIVIL ACTION NO. 85-1685
v.	:	
THE COMMONWEALTH OF THE BAHAMAS and MINISTRY OF TOURISM	:	

ORDER

This 25th day of October, 1985, it is ORDERED that:

1. Plaintiffs' Motion to Remand Civil Action No. 84-5123 to the Philadelphia County Court of Common Pleas is DENIED.

2. Plaintiffs' Motion to Sever and Remand the claims against all defendants other than the Bahamas and the Ministry of Tourism is DISMISSED as moot.

3. The Motions of defendants the Bahamas and the Ministry of Tourism to Dismiss these cases for lack of personal and subject matter jurisdiction and failure to state a cause of action are GRANTED.

4. The claims against all remaining defendants in No. 84-5123 are remanded to the Philadelphia County Court of Common Pleas.

_____

Ch. J.

APPENDIX D

FILED APR-2 1985

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LOUIS and JACQUELINE TUCKER, h/w and CHRISTINA TUCKER, by her parents and guardians, LOUIS and JACQUELINE TUCKER, *Plaintiffs*,	:	CIVIL ACTION
v.	:	
THE COMMONWEALTH OF THE BAHAMAS and MINISTRY OF TOURISM, *Defendants*.	:	NO. 85-1685

STIPULATION

It is hereby stipulated between counsel for the plaintiffs and counsel for the defendants for the purposes of Civil Actions 84-5123 and 85-1685 in this Court only, that:

1. Defendant, the Ministry of Tourism, at least from 1980 to the present has encouraged U.S. citizens to come to the Bahamas as tourists.

2. The Ministry of Tourism regularly uses U.S. advertisement media, including, but not limited to, radio, television, newspapers and magazines, to encourage U.S. citizens to come to the Bahamas as tourists.

3. The Ministry of Tourism regularly uses the U.S. telephone system in connection with its efforts in this country to encourage U.S. citizens to come to the Bahamas as tourists.

4. The Ministry of Tourism uses the U.S. advertisement media to encourage U.S. citizens to engage in sports activities in the Bahamas.

5. The Ministry of Tourism uses a toll free "800" number in the U.S. called a "Sports Hotline" to promote sports activities in the Bahamas.

6. The Ministry of Tourism has commissioned in the U.S. the printing of brochures promoting various sports activities, of which Exhibit "H" to Plaintiffs' Response to the Commonwealth of the Bahamas and the Ministry of Tourism's Motion to Dismiss is an example.

7. In 1984, over 85% of the tourism business to the Bahamas came from the United States. For other years since 1980, substantial percentages of the tourism business to the Bahamas has come from the United States.

8. The Ministry of Tourism, at least since 1980, has used U.S. firms and business entities to promote tourism in the Bahamas and encourage U.S. citizens to go to the Bahamas as tourists.

Dated: April 1, 1985

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APPROVED: April 2, 1985

ALFRED L. LUONGO, C.J.

FILED
NOV 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-580

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LOUIS and JACQUELINE H. TUCKER,
h/w and CHRISTINA TUCKER,
by her parents and guardians,
LOUIS and JACQUELINE H. TUCKER,
Petitioners,

v.

WHITAKER TRAVEL, LTD.,
ATKINSON & MULLIN TRAVEL, INC.,
R.M. TOURS a/k/a RICHARD MOSS TOURS, LTD.,
HAPPY TRAILS STABLES,
COMMONWEALTH OF THE BAHAMAS
and the MINISTRY OF TOURISM,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS COMMONWEALTH OF THE BAHAMAS AND THE MINISTRY OF TOURISM

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21pp

QUESTIONS PRESENTED

1. Whether the Third Circuit was correct when it ruled—in agreement with each of the other circuits previously presented with the same question—that the first clause of § 1605(a)(2) of the Foreign Sovereign Immunities Act requires that there be a nexus between a plaintiff's claim and a foreign sovereign's commercial activities in the United States before a United States court may exercise jurisdiction over the foreign sovereign.

2. Whether the Third Circuit correctly ruled that there was no jurisdiction under clause 3 of § 1605(a)(2) of the Foreign Sovereign Immunities Act because the acts upon which petitioners base their claims were not connected to any commercial activities of the Commonwealth of The Bahamas or the Ministry of Tourism and those acts caused no direct effect in the United States.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-580

LOUIS and JACQUELINE H. TUCKER,
h/w and CHRISTINA TUCKER,
by her parents and guardians,
LOUIS and JACQUELINE H. TUCKER,
Petitioners,

v.

WHITAKER TRAVEL, LTD.,
ATKINSON & MULLIN TRAVEL, INC.,
R.M. TOURS a/k/a RICHARD MOSS TOURS, LTD.,
HAPPY TRAILS STABLES,
COMMONWEALTH OF THE BAHAMAS
and the MINISTRY OF TOURISM,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS COMMONWEALTH OF THE BAHAMAS AND THE MINISTRY OF TOURISM

STATEMENT OF THE CASE

(a) Statement of Facts

Petitioners Jacqueline and Christina Tucker contacted defendant Whitaker Travel, Ltd., a privately owned travel agency in Pennsylvania, in response to a news-

paper advertisement by Apple Tours promoting one of their tours to the Commonwealth of The Bahamas ("The Bahamas"). Through defendant Whitaker Travel, Ltd., petitioners bought an Apple Tour to The Bahamas, which another privately owned travel agency in Pennsylvania, Atkinson & Mullin Travel, Inc., was to provide.

After arriving at the Ambassador Beach Hotel in The Bahamas, petitioners received an advertising leaflet from defendant Happy Trails Stables, a privately owned and operated stable in The Bahamas. Petitioners contracted directly with defendant Happy Trails Stables for horseback rides, during the course of which petitioners fell from their horses and sustained injuries.

The only connection that respondents The Bahamas and the Ministry of Tourism have to this case is that, since 1980, the Ministry of Tourism has in the United States advertised tourism, including sports activities, in The Bahamas.

(b) Course of Proceedings

Petitioners Louis and Jacqueline Tucker and their daughter, Christina Tucker, filed their first Complaint in the Court of Common Pleas of Philadelphia County against Whitaker Travel, Ltd., Atkinson & Mullin Travel, Inc., R. M. Tours, Happy Trails Stables, The Bahamas, and the Ministry of Tourism. Petitioners subsequently refiled the same Complaint in the Court of Common Pleas of Philadelphia County, but this time named as defendants only The Bahamas and the Ministry of Tourism.

The foreign state defendants The Bahamas and the Ministry of Tourism removed both cases to the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1441(d) and 1446.

On October 25, 1985, the District Court for the Eastern District of Pennsylvania granted defendants The Bahamas and the Ministry of Tourism's Motion to Dismiss for lack of personal and subject matter jurisdiction

on the grounds of sovereign immunity and for failure to state a claim upon which relief could be granted. The district court also denied plaintiffs' Motion to Remand the claims against the foreign state defendants to the Philadelphia County Court. Having dismissed the foreign state defendants, the district court then remanded all remaining defendants to the Philadelphia Court of Common Pleas. The district court's opinion is reported at 620 F. Supp. 578 and is reproduced as Appendix C to the Petition for Writ of Certiorari (hereinafter Pet. App. C).

On appeal, in a unanimous opinion, the Third Circuit affirmed the district court's holding that it had no personal or subject matter jurisdiction over the foreign state defendants The Bahamas and the Ministry of Tourism.[1] The Third Circuit noted that the Foreign Sovereign Immunities Act of 1976 ("FSIA")[2] provides a foreign state immunity from suit in the United States unless the claim falls within one of the statutory exceptions. Pet. App. B-2. Thus, according to the court of appeals, there could be no subject matter jurisdiction over The Bahamas or the Ministry of Tourism unless plaintiffs' claim satisfies one of the three exceptions enumerated in § 1605(a)(2), which provides:

> [clause 1] the action is based upon a commercial activity carried on in the United States by the foreign state; or [clause 2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [clause 3] upon an act outside the territory of the United States in connection with a commercial activity of the for-

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[1] The Third Circuit's Opinion is unreported and is reproduced as Appendix B to the Petition for Writ of Certiorari (hereinafter Pet. App. B).

[2] Pub. L. 94-583, 90 Stat. 2891, *codified at* 28 U.S.C. §§ 1330, 1332(a)(2)-(a)(4), 1391(f), 1441(d), and 1602-1611.

> eign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2).

The Third Circuit noted that The Bahamas and the Ministry of Tourism had stipulated that they were engaged in commercial activity in the United States, *i.e.*, the promotion of tourism. Pet. App. B-3. However, this alone was insufficient to bring plaintiffs' claim within § 1605(a)(2). Instead, the Third Circuit ruled that in order for clause 1 of § 1605(a)(2) to be applicable, "there must be a nexus between the plaintiffs' grievance and the sovereign's commercial activity in the United States." Pet. App. B-3. The Third Circuit affirmed the district court's holding that the relationship between plaintiffs' claim (that their injuries were caused by the negligence of certain employees of a privately owned and operated stable in The Bahamas) and The Bahamas and the Ministry of Tourism's advertisements in the United States is "too attenuated to satisfy the requirements that the claim be 'based upon' the foreign state defendants' commercial activity in the United States." Pet. App. B-3.

The Third Circuit also held that "[p]atently, the allegations of the complaints do not satisfy the requirement of clause 2 that the action be based upon 'an act performed in the United States.'" Pet. App. B-3.

The Third Circuit likewise held inapplicable clause 3 of § 1605(a)(2), whereby a foreign state loses its immunity if the claim is "based upon" an act outside the United States "in connection with" a foreign state's commercial activity elsewhere and that act causes a "direct effect" in the United States. According to the court, the acts upon which plaintiffs based their claim were "in no way connected to the foreign state defendants' commercial activity." Pet. App. B-3 - B-4. In addition, the court held that "causing injury to an American citizen abroad does not cause a direct effect in the United States despite

the fact that the injury continues to cause suffering." Pet. App. B-4.

Furthermore, the Third Circuit ruled that the plaintiffs had no cognizable claim against The Bahamas and the Ministry of Tourism. The court rejected plaintiffs' argument that The Bahamas and the Ministry of Tourism's decisions whether and how to regulate tourism, police the activities of its citizens, and investigate accidents within its borders are commercial activities. Instead, the court held that "these are 'peculiarly governmental' activities," for which The Bahamas and the Ministry of Tourism would retain their sovereign immunity. Pet. App. B-4. In addition, the court affirmed the district court's holding that as for plaintiffs' claims for negligent misrepresentation, breach of warranty, or duty to warn, "the facts alleged failed to state a claim upon which relief could be granted." Pet. App. B-3 n.1.

On July 11, 1986, the Third Circuit denied the Tuckers' petition for a rehearing *en banc*. The Tuckers now petition this Court for a writ of certiorari.

REASONS FOR DENYING THE WRIT

There are at least three reasons why this Court should not grant certiorari in this case. First, not only is there no conflict among the circuits as to how clause 1 of § 1605 (a) (2) of the FSIA is to be interpreted, there is no likelihood this Court would uphold petitioners' interpretation because it would require this Court to rewrite § 1605 (a) (2) to conflict with its legislative history. Second, petitioners are simply wrong that the circuits, when determining whether jurisdiction may be exercised over a foreign sovereign under clause 3 of § 1605 (a) (2) of the FSIA, distinguish between whether the claimant is a corporation or a natural person. Finally, the case is not worthy of certiorari. Even if a United States court were to exercise jurisdiction, petitioners have no claim

against The Bahamas and the Ministry of Tourism on which they could prevail.

1. There Is No Conflict Among the Circuits.

This Court should deny the writ of certiorari because not only is there no conflict among the circuits as to the interpretation of clause 1 of § 1605(a)(2) of the FSIA, no circuit has ever adopted petitioners' intrepretation of § 1605(a)(2). In fact, numerous courts have specifically rejected petitioners' "doing business" test. *See Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1110 n.8 (5th Cir. 1985); *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 202 (5th Cir. 1984); *Castillo v. Shipping Corp. of India*, 606 F. Supp. 497, 502 (S.D.N.Y. 1985); *Tigchon v. Island of Jamaica*, 591 F. Supp. 765, 767 (W.D. Mich. 1984); *In Re Disaster at Riyadh Airport*, 16 Av. Cas. (CCH) 17,880 (D.D.C. 1981); *Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1057, 1059-60 (E.D.N.Y. 1979). In addition, petitioners seek to have this Court adopt a test which would rewrite the first clause of § 1605(a)(2) merely because their claim fails to satisfy that section as Congress drafted it.

Under the first clause of § 1605(a)(2), there is no subject matter or personal jurisdiction over a foreign sovereign unless:

> the action is *based upon* a commercial activity carried on in the United States by the foreign state * * * *.

§ 1605(a)(2) (emphasis added). Thus, before jurisdiction may be exercised over a foreign sovereign under clause 1 of § 1605(a)(2), not only must the foreign sovereign "carry on" commercial activity in the United States, but the plaintiff's claim must also be "based upon" that commercial activity. However, petitioners argue that under clause 1 of § 1605(a)(2), a United States court will have subject matter jurisdiction merely if the foreign state is "doing business" in the United States or

if its commercial activities have "substantial contact" with the United States. Petitioners' interpretation would satisfy § 1605(a)(2)'s requirement that the foreign state "carry on" commercial activity in the United States, but it would totally eliminate the "based upon" requirement of § 1605(a)(2).

In addition, that Congress did not intend to adopt a "doing business" test in § 1605(a)(2) is clearly evidenced by the legislative history of the FSIA.[3] The Section-by-Section analysis states that § 1605 "requires some connection between the lawsuit and the United States." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 13, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6612. It also reiterates the "based upon" standard of § 1605(a)(2) by stating:

> Section 1605(a)(2) mentions three situations in which a foreign state would not be entitled to immunity with respect to a *claim based upon a commercial activity*.

House Report, *supra*, at 18, *reprinted* at 6617 (emphasis added).

Moreover, if this Court were to adopt petitioners' interpretation of § 1605(a)(2) (*i.e.*, that a foreign sovereign is subject to the jurisdiction of the United States courts solely because it does business in the United States), every foreign government that advertises in the United States would become an insurer of the safety of each American tourist who visits its country. This would clearly flout Congressional intent, for Congress in adopting the FSIA did not intend to "open the floodgates" to the United States courts for any controversy around the world an American may have with a foreign sovereign.

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[3] Had Congress wanted to adopt a "doing business" test in § 1605(a)(2) it surely could have, for it did so in the expropriation claims provision in § 1605(a)(3). *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 19, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6618.

See Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d at 202. As Bruno A. Ristau, Chief of the Foreign Litigation Section of the Civil Division of the Justice Department, stated:

> It should also be stressed that the long-arm feature of the bill [FSIA] will insure that only those disputes which have a relation to the United States are litigated in the courts of the United States, and that our courts are not turned into small "international courts of claims." The bill is not designed to open up our courts to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world.

Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 31 (1976) (statement of Bruno A. Ristau).

Therefore, in order to satisfy the "based upon" requirement of the first clause of § 1605(a)(2), the Third Circuit was correct to rule that "there must be a nexus between the plaintiffs' grievance and the sovereign's commercial activity in the United States." Pet. App. B-3. In so ruling, the lower court followed the plain language of the first clause of § 1605(a)(2) as well as the legislative history of the FSIA.

Furthermore, the decision of the court of appeals construing § 1605(a)(2) does not conflict with that of any other circuit. Petitioners' contention that the circuit courts have adopted conflicting tests to interpret the phrase "based upon" in the first clause of § 1605(a)(2) is simply inaccurate. Moreover, no circuit has held, as petitioners would have this Court do, that a United States court may exercise jurisdiction over a foreign state defendant under § 1605(a)(2) of the FSIA merely because it does business in the United States.

Instead, every circuit court which has previously construed the "based upon" requirement of the first clause of § 1605(a)(2) has either expressly adopted or cited to the Third Circuit's "nexus" test or has adopted a test differing in semantics only. *See Callejo v. Bancomer, S.A.*, 764 F.2d at 1110 n.8; *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d at 202; *Tuck v. Pan American Health Org.*, 668 F.2d 547, 550 n.6 (D.C. Cir. 1981); *Gemini Shipping, Inc. v. Foreign Trade Org. for Chemicals and Foodstuffs*, 647 F.2d 317, 319 (2d Cir. 1981); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); *cf. Yugoexport, Inc. v. Thai Airlines Int'l, Ltd.*, 749 F.2d 1373, 1375 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2326 (1985); *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 n.22 (D.C. Cir. 1982).

2. The Circuits Do Not Distinguish Between Corporations and Individuals When Determining Jurisdiction Under the FSIA.

This Court should deny the writ because the Third Circuit and other federal courts are not—contrary to petitioners' assertions—treating the claims of natural persons any differently than those of corporations when determining whether jurisdiction over a foreign state may be exercised under clause 3 of § 1605(a)(2) of the FSIA. In order for there to be subject matter jurisdiction over a foreign sovereign under clause 3 of § 1605(a)(2), the cause of action must be based:

> upon an act outside the territory of the United States *in connection with* a commercial activity of the foreign state elsewhere and that act causes a *direct effect* in the United States * * * *.

§ 1605(a)(2) (emphasis added).

Remarkably, petitioners discuss two circuit court opinions which construe clause 3 of § 1605(a)(2) and then

state "but other Circuit Courts have not directed their sights on the Clause Three 'direct effect' problem." Pet. at 20. They thus ignore *nine* other circuit court opinions directly on point, as well as numerous district court opinions. Had petitioners looked at the whole body of case law, they would have realized that the federal courts are not determining the scope of jurisdiction under clause 3 of § 1605(a)(2) based upon whether the claimant is a natural person or a corporation.

Instead, the courts have uniformly focused, consistent with the language of clause 3 of § 1605(a)(2) and its legislative history, on whether the act causes a "direct effect in the United States" irrespective of the status of the claimant. The legislative history of § 1605(a)(2) specifies that "direct effect" should be interpreted by reference to Section 18 of the Restatement (Second) of Foreign Relations Law of the United States (1965). *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 19, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6618. That section governs how American law may be applied to conduct outside of the United States and states that the conduct must have a "substantial" effect in the United States that is "a direct and foreseeable result of the conduct outside the territory" of the United States. Restatement (Second) of Foreign Relations Law § 18(b)(ii)-(iii) (1965); *Callejo v. Bancomer, S.A.*, 764 F.2d at 1111; *Transamerican Steamship Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1004 (D.C. Cir. 1985); *Maritime International Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1110-11 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983).[4]

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[4] Of course, in determining whether the effects are both "substantial" and "direct and foreseeable," it is obvious that the question is not whether there were *any* effects in the United States. For example, in Callejo v. Bancomer, S.A., 764 F.2d at 1112, the Fifth Circuit noted that because the individual depositors were located in the United States, the effects were "inevitably" felt there. That was not the end of the court's analysis, however. The

Applying this rule in suits brought by both individuals and corporations for either financial loss or personal injury, the federal courts uniformly have found jurisdiction over a foreign state defendant under clause 3 of § 1605(a)(2) when an act of the foreign state outside of the United States, in connection with a commercial activity of the foreign state elsewhere, caused a "direct effect" in the United States. *See Grass v. Credito Mexicano, S.A.*, 797 F.2d 220, 221-22 (5th Cir. 1986); *Riedel v. Bancam, S.A.*, 792 F.2d 587, 591-92 (6th Cir. 1986) (Sixth Circuit found "direct effect" in United States in suit brought by individual depositors for violation of Ohio securities laws); *Callejo v. Bancomer, S.A.*, 764 F.2d at 1110-12 (under clause 3 of § 1605(a)(2), Fifth Circuit found "direct effect" in suit brought by individuals against a foreign state defendant alleging a breach of contract concerning certificates of deposits); *Transamerican Steamship Corp. v. Somali Democratic Republic*, 767 F.2d at 1003-04 (in suit brought by American shipping corporation, District of Columbia Circuit found that the "effects of the [foreign state] Agency's detention of the [American] ship and demand for payment in the United States were both direct and substantial within the meaning of the FSIA"); *Harris Corp. v. National Iranian Radio and Television*, 691 F.2d 1344, 1351 (11th Cir. 1982); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 820 n.13 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 829 (1982) (Third Circuit found the requisite "direct effect" under clause 3 of § 1605(a)(2) in suit brought by individual seamen based on a breach of employment contracts); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d at 311-13; *see also Meadows v.*

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court also added that the effects in the United States were foreseeable. The foreign state defendants had engaged in a regular course of business conduct with the individual claimants for several years. In addition, the effects in the United States were not fortuitous, as in those cases where the person injured abroad happens to be an American. *Id.*

Dominican Republic, 628 F. Supp. 599, 604-05 (N.D. Cal. 1986) (court found "direct effect" in suit brought by individual American businessmen for breach of contract to recover commissions due for services performed); *Schmidt v. Polish People's Republic*, 579 F. Supp. 23, 27 (S.D.N.Y.), *aff'd*, 742 F.2d 67 (2d Cir. 1984); *Wyle v. Bank Melli of Tehran, Iran*, 577 F. Supp. 1148, 1157-58 (N.D. Cal. 1983); *Ohntrup v. Firearms Center, Inc.*, 516 F. Supp. 1281, 1286-87 (E.D. Pa. 1981) (in personal injury suit brought by American individuals, court found "direct effect" in United States where plaintiffs' injuries in the United States were both "substantial and foreseeable consequence" of foreign state defendant's actions), *aff'd mem.*, 760 F.2d 259 (3d Cir. 1985).

However, the courts also uniformly hold that when an individual American is injured overseas or an American corporation's property is damaged or destroyed overseas, there is no jurisdiction under clause 3 of § 1605(a)(2) over a suit brought either by the American corporation or the individual because the effects in the United States are not "direct and foreseeable"; at best they are secondary or indirect effects of the injuries that occurred overseas and are not sufficient to meet the "direct effect" requirement in § 1605(a)(2). *See Australian Government Aircraft Factories v. R. C. Lynne*, 743 F.2d 672, 675 (9th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985) (direct effect of foreign state defendant's misconduct was destruction of corporation's property in Indonesia; any financial loss by the corporation in the United States, including cost of replacement, was indirect consequence); *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329, 332 (9th Cir.), *cert. denied*, 469 U.S. 1035 (1984); *Keller v. Transportes Aereos Militares Ecuadorianos*, 601 F. Supp. 787, 789-790 (D.D.C. 1985); *Zernicek v. Petroleos Mexicanos*, 614 F. Supp. 407, 412-413 (S.D. Tex. 1985); *Close v. American Airlines, Inc.*, 587 F. Supp. 1062, 1064-66 (S.D.N.Y. 1984); *Harris v. VAO Intourist, Moscow*, 481 F. Supp. at 1061-65; *Upton v. Empire of Iran*, 459 F.

Supp. 264, 266 (D.D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979); *cf. Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d at 1111; *Carey v. National Oil Corp.*, 592 F.2d 673, 676 (2d Cir. 1979).

Based on this well-established and consistent body of case law, the Third Circuit correctly found that petitioners' claim failed to satisfy the "direct effect" requirement in clause 3 of § 1605(a)(2). Pet. App. B-3–B-4. Even if the court of appeals had ruled otherwise, petitioners' claim still would not have satisfied clause 3 of § 1605(a)(2). In addition to requiring a "direct effect" in the United States, that section requires that petitioners' claim be based upon a foreign state's act "in connection with" its commercial activity. However, as both lower courts held, the acts upon which petitioners base their claims are in no way connected to The Bahamas and the Ministry of Tourism's commercial activities either in the United States or elsewhere. Pet. App. B-4; Pet. App. C-11.

3. The Case Is Not Cert-Worthy.

Even if this Court were inclined to reconsider the scope of jurisdiction under the FSIA,[5] this is not the appropriate case. Both of the lower courts have already held that petitioners have no cognizable claim against The Bahamas and the Ministry of Tourism over which a United States court could exercise jurisdiction. In one claim, petitioners seek to hold The Bahamas and the Ministry of Tourism liable for a number of alleged governmental or regulatory acts or omissions. However, the FSIA codified the long established policy in the United States that foreign states are absolutely immune for acts "which are sovereign or governmental in nature." *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 14, *reprinted in* 1976 U.S. Code Cong. &

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[5] *See* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983).

Ad. News at 6613. Therefore, as the lower courts correctly concluded, the Bahamian government's decisions on whether or how to regulate tourism, including horseback riding, investigate accidents within its borders, and to police its own citizens are not commercial activities but rather "peculiarly governmental" activities that are immune from the jurisdiction of the United States courts. Pet. App. B-4; Pet. App. C-7.

As for petitioners' claims for negligent misrepresentation, breach of warranty, or duty to warn, both the District Court and the Third Circuit have held that the facts alleged failed to state a claim for which relief could be granted. Pet. App. B-3 n.1; Pet. App. C-9 - C-11.

CONCLUSION

For all of the foregoing reasons, Judges Aldisert, Garth and Sloviter correctly upheld the District Court for the Eastern District of Pennsylvania's decision in this case. Their opinion is in accord with the plain terms of the FSIA, its legislative history, and the decisions of the other circuits. This fact, combined with the fact that petitioners have no cognizable claim against The Bahamas and the Ministry of Tourism, renders this petition one that this Court may, and should, readily deny.

Respectfully submitted,

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